Supreme Court, U.S.
FILED
MAR 7 - 2007
OFFICE OF THE CLERK

(2)

No. 06-669

IN THE
Supreme Court of the United States

VERITY INTERNATIONAL, LTD.,
AUTOMATIC COMMUNICATIONS, LTD.,
ROBERT GREEN, and MARILYN SHEIN,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONERS' REPLY MEMORANDUM

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PETITIONERS' REPLY MEMORANDUM

I.

PETITIONERS' FCC LICENSE AND THE SERVICES THEY PERFORMED MADE THEM CURRENT, NOT POTENTIAL, COMMON CARRIERS UNDER THE FCC ACT

The District Judge acknowledged in his opinion denying petitioners' motion for judgment on the pleadings that because of their license and tariffs the petitioners were "common carriers" for purposes of the Communications Act of 1934, as amended, 47 U.S.C. §151 et seq.. He observed

that strict application of *Federal Trade Commission v. Miller*, 549 F.2d 452 (7th Cir. 1977), would require dismissal of the FTC's lawsuit but held that, contrary to *Miller*, the petitioners were subject to FTC regulation because their particular activities in this case were "extraneous activities" and "the carrier exemption to the FTC Act should be construed no more broadly than its purpose." Pet. App. C, pp. 83a-86a.

The court of appeals totally ignored *Miller* and asserted that the petitioners were only *potential* common carriers because their license only entitled them "to become" a common carrier. Pet. App. A, p.17a. The government's Brief in Opposition eschews the District Judge's reasoning and adopts the rationale of the court of appeals. Br. in Opp. 7.

Obviously, however, *any* license is a present authorization to engage in *future* conduct. A license to practice law is an authorization thereafter to act as a lawyer, but, once issued, it immediately confers jurisdiction on the Bar Association over the holder of that license without regard to whether he exercises the authority granted by the license. By the same token, the rationale of the *Miller* decision is that issuance of a license by a federal agency that regulates "common carriers subject to the Acts to regulate commerce" subjects the licensee to the supervision of the licensing agency and precludes duplicative oversight by the Federal Trade Commission.

Moreover, it is undisputed that the petitioners actually used their license. They were licensed in December 1999 to be a "global international reseller" of communications services. They exercised that privilege by contracting with Telecom Malagasy for the right to control a

block of Madagascar numbers. They then sold to Global Internet Billing ("GIB") – an entity not related to the petitioners – the right to include the Madagascar telephone numbers in a "dialer" service GIB offered to interested website hosts or owners, including "adult entertainment" websites. This sale is precisely the conduct that any carrier engages in when it assigns telephone numbers to subscribers. Petitioners also entered into agreements with other carriers such as AT&T, AT&T (UK), and Sprint to complete the connections and generate the subscribers' bills.

The government's Brief in Opposition characterizes the petitioners as creators of "a billing system" (Br. In Opp. 2), but the fact is that this "billing system" long predates petitioners, and has been universally used by carriers for many decades to bill consumers for long-distance calls. The "billing system" at issue is routine "automatic number identification" or "ANI" billing -- pursuant to which a party making a call is billed based on the number dialed by the party and the duration of the call -- over which the FCC has primary jurisdiction. *See, e.g.*, 47 C.F.R. §§ 64.2401 (FCC "truth-in-billing requirements"); 64.1602 (FCC restrictions on carrier's use or sale of ANI information). AT&T told the district court: "[I]f the mere sending of a bill to a line subscriber for telephone service using ANI information is deceptive . . . then every telephone bill ever sent is deceptive." Joint Appendix A2324. Indeed, it is undisputed that petitioners had no input at all into the bills sent to consumers by AT&T using ANI billing.

Consumers were not purchasing or being charged for use of a billing system. They were billed for long-distance calls indisputably made from their telephones. Neither the FTC nor the government's Brief in Opposition has ever explained why it was unfair or deceptive to bill consumers at

the applicable tariffed rates for international calls indisputably made voluntarily from their telephones after full – and unchallenged – disclosure of these charges.

II.

TELEPHONE SUBSCRIBERS ARE NOT DECEIVED IF THE SAME PROCESS FOR BILLING "FILED RATE" CHARGES ARE IMPOSED FOR ACCESS FROM THEIR TELEPHONES TO ADULT ENTERTAINMENT INTERNET SITES AS FOR ACCESS TO OTHER INTERNET SITES

The Federal Trade Commission's lawsuit and the government's Brief in Opposition seek to carve out a unique rule of contestability for telephone subscribers whose home telephones are used to reach foreign "adult entertainment" sites. No justification for such special regulatory treatment is offered, nor are the parameters that warrant or limit such special treatment even specified. If such exceptions were ever warranted, the FTC would not be the proper federal agency to create special treatment for such subcategories of telecommunications traffic or for such telecommunications subscribers.

Telephone subscribers are routinely charged for numbers dialed from the subscribers' telephones, and it is never a defense to a long-distance charge that the individual subscriber did not personally authorize the long-distance call made from his phone. Nor has the Brief in Opposition or the FTC ever suggested how a carrier can determine whether a subscriber has personally authorized any long-distance call.

The Brief in Opposition asserts that the "filed rate doctrine" does not apply because the petitioners "were

charging consumers for access to adult entertainment" and not for "long-distance telephone service to Madagascar." Br. in Opp. 11. In fact, however, subscribers were charged, as they are in the case of any international calls, including those bound for the Internet, for long-distance telephone calls based only on the number dialed by the party making the call and the duration of the call. They had agreed, following full disclosure that the FTC has not challenged as inadequate, to pay such charges for calls made to these numbers. Callers to these numbers from the subscribers' computers were apparently motivated by their desire to view "adult entertainment," but the legal right to charge the filed rate for calls to these numbers should not depend on the motivation of the caller. Nor should the subscribers' duty to pay turn on the nature of the information that the caller is seeking to obtain.

CONCLUSION

For the foregoing reasons and those stated in the Petition for a Writ of Certiorari, the writ should be granted.

March 2007

Respectfully submitted,

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